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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. _____.

ROBERT McCLELLAN,

Plaintiff-Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

STATEMENT AS TO JURISDICTION.

Pursuant to Rules 13(2) and 15 of this Court, appellant files this statement of the bases upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment below dismissing plaintiff's action, and the reasons why this Court should exercise such jurisdiction in this case.

OPINIONS BELOW.

The Court of Common Pleas for Cuyahoga County and the Court of Appeals for the Eighth Judicial District of Ohio did not deliver written opinions, but the grounds for their rulings are set forth in their respective journal entries which are reproduced in the appendix to this Jurisdictional Statement at p. 12.

JURISDICTION.

This appeal is taken from a final judgment made by the Court of Appeals for the Eighth Judicial District of Ohio which affirms the order of the Common Pleas Court for Cuyahoga County quashing service upon the defendant. That final order from which this appeal is taken was made and entered on June 1, 1964. Thereafter, the Supreme Court of Ohio exercised its discretionary authority by dismissing an appeal to that court and denying a Motion to Certify the Record on October 21, 1964. Notice of Appeal was filed in the Court of Appeals for the Eighth Judicial District on January 15, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(2).

QUESTIONS PRESENTED.

1. Whether the Ohio Railway Venue Statute (Ohio Revised Code Section 2307.37) violates the Privileges and Immunities Clauses of Article IV, Section 2 and the Fourteenth Amendment of the United States Constitution by discrimination against a citizen of West Virginia.

2. Whether the Ohio Railway Venue Statute violates the provisions of the Equal Protection Guarantee of the Fourteenth Amendment of the United States Constitution by unreasonable classification and discrimination with respect to claimants against railroads as distinguished from all other claimants.

3. Whether the Ohio Railway Venue Statute violates the Equal Protection Guarantee of the Fourteenth Amendment of the United States Constitution by unreasonable classification and discrimination against persons not resident in Ohio on an arbitrary date.

4. Whether the Ohio Railway Venue Statute violates the Supremacy Clause of Article VI of the United States Constitution by discriminating against claimants seeking to enforce the Federal Employers Liability Act.

STATUTE INVOLVED.

Ohio Revised Code Section 2307.37 provides as follows:

> "An action against the owner or lessee of a line of mail stages or other coaches, a railroad company, inter-urban railway company, suburban railroad company, or street railway company owning or operating a railroad, inter-urban railway, or street railway within the state may be brough in any county through or into which such line, railroad, inter-urban railway, or street railway passes or extends. *All actions against such owner, lessee, or company for injuries to persons or property or for wrongful death must be brought in the county in which the cause of action or some part thereof arose, or in the county in which the claimant for injuries to person or property or one whose wrongful death was caused resided at the time when the cause of action arose,* if the road or line of such owner, lessee, or company or any part thereof is located in such county. If no part of such line or road is located in such county, then such actions may be brought in the county in which any part of such road or line is located, nearest the place where the claimant for injuries to person or property or the one whose wrongful death was caused, so resided." (Emphasis added.)

Section 56 of Title 45 of the United States Code (the Federal Employers Liability Act) provides in pertinent part as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of

action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the Several States."

STATEMENT OF THE CASE.

Robert McClellan is a citizen and lifetime resident of West Virginia. He was injured in the course of his employment as an employee of the defendant railroad in Kentucky. The defendant is a Virginia Corporation which operates a system of railroads from the east coast to Chicago and St. Louis. Portions of its lines pass through nineteen of Ohio's eighty-eight counties. The executive offices of this railroad, including the offices of the president and the Chairman of the board, are located in Cleveland, Ohio.

Plaintiff-appellant instituted this action at Cleveland, Ohio, in the Court of Common Pleas for Cuyahoga County pursuant to the provisions of the Federal Employers Liability Act. Service was accomplished by delivering a copy of the petition and a summons to the executive offices of the railroad in Cleveland, in conformity with Ohio procedures for service on any corporate defendant. The defendant then filed a motion to quash the summons and the service of summons, relying entirely upon the provisions of Ohio Revised Code § 2307.37. Specifically, defendant's motion to quash the summons asserted:

> "* * * under and pursuant to the provisions of Ohio Revised Code Section 2307.37 this action for personal injuries to the plaintiff cannot be maintained in the Common Pleas Court of Cuyahoga County for the reasons that the plaintiff is a citizen and resident of the State of West Virginia and his alleged cause of action arose and occurred in the State of Kentucky * * *"

In substance, defendant argued that the provisions of the "Ohio Railway Venue Statute" prohibit any action against a railway in Ohio where the plaintiff is not an Ohio resident and the cause of action did not accrue in Ohio.

Ohio statutes have long prohibited application of the doctrine of *forum non conveniens* in actions between persons or corporations who are not citizens or residents of Ohio, even where the cause of action accrued outside of Ohio. See *Mattone v. Argentina*, 123 Ohio St. 393, 175 N. E. 603 (1931); *Perkins v. Benguet Consol. Min. Co.*, 158 Ohio St. 145, 107 N. E. 2d 203 (1952). Since railroads are the only form of transportation described in Ohio Revised Code Section 2307.37 which are still in existence at this time, defendant argued that this special statutory immunity to suit was available to railroads while it was not available to any other corpotate entity or to any other means of transportation or communication.

The trial court granted the motion to quash the summons, relying entirely upon the early Ohio decision in *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, 140 N. E. 94, *appeal dismissed by stipulation of the parties*, 266 U. S. 639 (1923). The *Loftus* case held in substance that a nonresident of Ohio could not maintain an action against a railroad in Ohio for injuries sustained outside of Ohio, because of the venue requirements of this same statute. The first syllabus of the Ohio Supreme Court decision in the *Loftus* case (the syllabus of the Ohio Supreme Court is the law of Ohio) states:

> "The amendment to Section 11273, General Code (109 O. L. 81) [now Ohio Rev. Code §2307.37], excludes from the jurisdiction of the state courts of Ohio all causes against the persons and companies therein referred to for injuries to person or property or for wrongful death occurring without the state of Ohio unless such claimant is a resident of this state."

Apparently believing that they were likewise bound by the earlier decision of the Ohio Supreme Court, the Court of Appeals for the Eighth Judicial District of Ohio affirmed that decision of the Common Pleas Court.

The Ohio Supreme Court declined to exercise jurisdiction, and chose to dismiss the appeal and to deny the motion to certify the record for review. At each stage of the proceedings, plaintiff-appellant has challenged the validity of the provisions of the Ohio Railway Venue Statute and insisted that its application in the circumstances of this case violated the provisions of the federal Constitution referred to earlier.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. Privileges and Immunities.

Equal access to the courts of justice is a fundamental and essential part of the Equal Protection Guarantee afforded to citizens of all states. The Ohio Railway Venue Statute, as it has been construed by the Ohio Supreme Court, denies non-citizens of Ohio the same right to use Ohio courts that is available to Ohio citizens. While the statute is drafted in terms of residence, rather than citizenship, it is obvious that the term "residence" is equivalent to citizenship in this context.

Of course, the Fourteenth Amendment to the federal Constitution defines citizenship as residence, where residence is given the traditional meaning of permanent residence or domicile. From the language of the Ohio Railway Venue Statute, it is clear that the legislature was referring to permanent residence, since virtually every other Ohio statute which uses residence as a yardstick for determining venue or jurisdiction has been held to refer to permanent or domiciliary residence. *Hayes v. Kentucky*

Bank, 125 Ohio St. 359, 181 Fed. 542 (1932) (service at "usual place of residence" is service at domicile); *Redrow v. Redrow*, 94 Ohio App. 38, 114 N. E. 2d 293 (1952) ("resident" of state for divorce jurisdiction means domiciliary); Ohio Rev. Code § 2307.38 (venue in action against "nonresident" includes county in which he is "found" within the state). In the *Loftus* case, the Ohio Supreme Court attempted to separate residence from citizenship, but the language of the opinion clearly shows that the court understood "residence" to be permanent rather than temporary. See *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, at 363, 140 N. E. 94, at 97:

> "Thus, if a citizen of Pennsylvania is a resident of Ohio, *or if such citizen is sojourning in or traveling through the State of Ohio, and is injured in person or property within the state,* the courts are open to him * * *." (Emphasis added.)

Numerous decisions of this Court have held unequivocally that a state may not bar citizens of sister states from the use of its courts under circumstances where its own citizens may use those tribunals. E.g., *McKnett v. St. Louis & S. F. Ry.*, 292 U. S. 230 (1934); *Miles v. Illinois Central R. R.*, 314 U. S. 698 (1942); *Missouri ex rel. Southern Pac. R. R. v. Mayfield*, 340 U. S. 1 (1950): Ohio cannot foreclose its judicial system to non-citizens in this or any other type of case under the guise of a venue statute.

Indeed, in some circumstances, this statute could prevent an injured litigant from having *any* forum. If, for example, an intrastate Ohio railroad mislabelled a dangerous commodity and that negligence caused damage in another state to which the commodity was carried by a second carrier, the injured party would be unable to enforce his rights in any court.

B. Equal Protection to Claimants Against Railroads.

Even if this statute were not in direct contravention of the Privileges and Immunities Guarantee of the federal Constitution, it is repugnant to the Equal Protection Guarantees. A state may not enact and enforce class legislation which discriminates against some special limited group of litigants without reason or justification. Cf. *Goesaert v. Cleary*, 335 U. S. 464 (1948); *Morey v. Doud*, 354 U. S. 457 (1957); *Chambers v. Baltimore and Ohio R. R.*, 207 U. S. 142 (1907). The Ohio Railway Venue Statute allegedly protects railways under the circumstances involved here, while no provision of the Ohio Code would afford the same immunity to suit to a bus company, an express company, a taxi company, an airline, a trucking company, a telephone company, a telegraph company, or any concern operating any other means of transportation or communication.

We cannot conceive of any justification for limiting the situs of suit against railroads where a similar defense is not granted to any other person or corporate entity even though he be engaged in the identical industry with a different type of instrumentality. There is no doubt whatever that plaintiff-appellant would be entitled to bring his action in this same trial court if he had been injured by a Cleveland-based trucking company, bus company, taxicab company or airline. A court might find that the legislature could reasonably classify businesses engaged in transportation or communication differently from other businesses for venue purposes, on the theory that their instrumentalities are in transit over a wide geographical area. Even that proposition is subject to substantial doubt when it is remembered that virtually every substantial business concern has agents operating motor vehicles in a large geographical region.

However, there can be no justification for singling out claimants against railroads so as to bar their suits under circumstances where claimants against companies engaged in any other form of transportation could bring an action. Indeed, neither defendant-appellee nor any of the courts of Ohio have even attempted to explain a rational basis of classification which would justify discrimination against railway claimants.

C. Equal Protection to Non-residents.

If the Ohio Railway Venue Statute is construed to refer to residents as temporary or transient residents, who would not thereby be citizens, the statute is in contravention of the Equal Protection Clause rather than the Privileges and Immunities Clause. A state may not discriminate against non-residents as a matter of whim or fancy unless there is some reasonable basis for classification to support such discrimination.

In some instances, this Court has upheld a classification in favor of residents and against non-residents, on the basis that a state has a right to afford special protection to its temporary residents whose taxes help to support the government and the courts. *Missouri ex rel. Southern Pac. R. R. v. Mayfield*, 340 U. S. 1 (1950); *Douglas v. New York, N. H. & H. R. R.*, 279 U. S. 377 (1929). However, the Ohio Railway Venue Statute determines rights on the basis of residence at the time the cause of action accrues—not residence at the time the cause of action is enforced in the courts. Thus, the rationale that those who are paying for the courts should have a special right to use them has no meaning here.

The fact that a claimant was a temporary resident at some time prior to his use of the Ohio courts does not imply that any taxes will be received from him during the

pendency of his lawsuit at that later time. Thus, the Ohio legislature has selected the date on which the cause of action arose as the critical date for determining residence, and it thereby effectively discriminates against persons who were resident in Ohio either before or after the date on which the injury occurred. If, for example, the plaintiff had moved to Ohio shortly after sustaining injury outside Ohio, or had moved from Ohio shortly before that incident, he would be barred from the use of Ohio courts, even though his taxes in Ohio were equal to or greater than those of an Ohio resident on the date of his injury.

Manifestly, there is and can be no logical justification for the arbitrary date selected by the legislature. Here again, neither the defendant-appellee nor any of the Ohio courts have made any attempts to justify this blatantly discriminatory legislation.

D. The Supremacy Clause.

Each of the above constitutional objections is given even greater importance when it is remembered that the right involved here is one created by federal statute. We recognize that early decisions of this Court have permitted states to discriminate against non-residents (where "residents" means "temporary residents") in refusing to enforce the provisions of the Federal Employers Liability Act, where such non-residents would be precluded from enforcing all non-federal rights against all other types of defendants in the same circumstances. In view of the language of 45 U. S. C., § 56, which provides that the state courts shall have concurrent jurisdiction with the federal courts in enforcing this act, we submit that further review of that question may be in order.

However, this Court has never authorized the type of rank discrimination presented by the Ohio Railway

Venue Statute which bars the use of Ohio courts to enforce rights under the Federal Employers Liability Act where Ohio does not recognize the doctrine of *forum non conveniens* generally. The fact that only railroads are protected by this special class legislation demonstrates that the federally created rights involved here are in jeopardy.

CONCLUSION.

The constitutional safeguards involved in this matter are of great importance in Ohio and elsewhere. Not only does this legislation attack fundamental guarantees in Ohio, but its pattern could well serve other states as a means to evade their responsibilities to maintain free access to their courts. We submit that this Court should exercise its appellate jurisdiction to settle these constitutional questions.

Respectfully submitted,

RICHARD M. MARKUS,
1400 Leader Building,
Cleveland, Ohio 44114,
Counsel for Appellant.

SINDELL, SINDELL, BOURNE, MARKUS,
STERN & SPERO,
Of Counsel.

APPENDIX.

COPY OF JOURNAL ENTRY ENTERED BY THE COURT OF APPEALS OF CUYAHOGA COUNTY ON JUNE 1, 1964.

"This cause came on for hearing upon the appeal on questions of law, assignments of error, and the original papers and pleadings from the Court of Common Pleas of Cuyahoga County and was submitted by counsel for the respective parties to the Court of Appeals with oral argument. On consideration whereof, the Court finds that there is no error apparent on the record in these proceedings prejudicial to the appellant.

"IT IS, THEREFORE, considered by the Court that the judgment of the Court of Common Pleas of Cuyahoga County be, and the same hereby is, affirmed and that the appellee, Chesapeake & Ohio Railway Company, recover from the appellant its costs herein expended.

"And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

"IT IS FURTHER ORDERED that a special mandate be sent to the Court of Common Pleas of Cuyahoga County, Ohio, for execution upon this judgment."

COPY OF ENTRY ENTERED BY THE CUYAHOGA COUNTY COMMON PLEAS COURT ON JANUARY 22, 1964.

"Motion to quash and to set aside service of summons is granted.

(Decision based on Section 2307.07 O. R. C. as interpreted in *Loftus vs. Pennsylvania R. R. Co.* 1070. S. 352 (1923).)"